Supreme Court, U.S.
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No. 97-1450

In The

Supreme Court of the United States

October Term, 1996

JOYCE YVONNE SHINN,
on behalf of Jonathan Daniel Shinn,

and

JOHN EUGENE SHINN,
on behalf of Jonathan Daniel Shinn,

Petitioners,

vs.

COLLEGE STATION INDEPENDENT SCHOOL DISTRICT, KENNETH WILBANKS, RAY CHANCELLOR, BOB CURRY and WILLIAM DORNBURG,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NUMBER ONE:

Whether the Fifth Circuit Court of Appeals erred in holding that Petitioners failed to state a proper claim or defense under 42 U.S.C. § 1983 regarding:

A. Jonathan Shinn's liberty interest in being free from emotional harassment;

B. Jonathan Shinn's liberty interest in being free from punishment absent personal guilt;

C. Jonathan Shinn's exercise of protected speech; and

D. Respondents' entitlement to qualified immunity.

QUESTION NUMBER TWO:

Whether the Fifth Circuit Court of Appeals erred in holding that Petitioners' appeal was frivolous.

LIST OF INTERESTED PARTIES

The Petitioners in this case are Joyce Yvonne Shinn and John Eugene Shinn, on behalf of Jonathan Daniel Shinn. Petitioners' counsel of record is Laurence W. Watts. Upon information and belief, Wayne T. Rife of West, Webb, Allbritton & Gentry is also counsel for Petitioners.

Respondents are correctly identified in the caption. Tom M. Davis, Jr. of Davis & Shank, P.C. is counsel of record for all respondents. Juliann H. Panagos and M. Lucille Anderson are also counsel for respondents. Each of the respondents join in this brief in opposition.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the Petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Fifth Circuit. The court of appeals' opinion is reported at 96 F.3d 783 (5th Cir. 1996), *petition for writ of cert. filed,* 65 U.S.L.W. 37 (U.S. April 1, 1997) (No. 96-1450). (For the Court's convenience, all citations to the October 3, 1996 opinion will be to the copy attached at Appendix 1-12 of the petition).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

Petitioners appealed to the Court of Appeals for the Fifth Circuit after Respondents' Motion for Summary Judgment was granted in the United States District Court for the Southern District of Texas. By its October 3, 1996 *Memorandum to Counsel,* the court of appeals affirmed the district court's decision that Petitioners failed to state a claim upon which relief could be granted. (Pet. App. 10). The court of appeals also concluded that Petitioners' appeal was frivolous and ordered that reasonable attorney's fees and double costs be awarded to Respondents as damages, pursuant to FED. R. APP. P. 38. (App. 1a). Petitioners appeal from the decision of the court of appeals.

B. Correction of Misstatements in the Petition.

The October 4, 1996 opinion of the court of appeals correctly sets forth the facts of this case. The opinion accurately reflects the concerns Petitioners had with the high school band director's conduct during the 1992-93 academic year and the actions taken by Petitioners as a result of their concerns. In the interest of brevity, Respondents respectfully direct the Court's attention to the appellate court's opinion. (Pet. App. 1-12).

Pursuant to United States Supreme Court Rule 15.1, Respondents bring to the Court's attention the following misstatements of fact contained in the petition.

Petitioners mischaracterize the incidents surrounding Wilbanks' prior employment as a "very controversial and troubled work history" on page 4 of the petition. In actuality, Petitioners' first amended complaint in this case refers only to information allegedly obtained from Superintendent Chancellor regarding two of band director Wilbanks' prior places of employment. First, Petitioners allege in their complaint that Wilbanks had questionable band instrument inventory problems at the end of the school year, a bad rapport with students and administrators, and verbally abused the choir director. Second, at Thomas Jefferson High School, Petitioners allege that Wilbanks had the same questionable band instrument inventory problem. Petitioners' subjective speculation about Wilbanks' undescribed behavior at West Columbia High School and at Thomas Jefferson High School, without more, does not amount to a "very controversial and troubled work history" as characterized by Petitioners on page 4 of the petition.

Further, Petitioners provide no record references for the following assertions on page 4 of their factual statement:

> Because tensions were running high between Wilbanks and the band, it was feared that Wilbanks might actually harm someone. By mid-October 1992, Wilbanks had focused increasingly more hostility at Jon. On October 16, Wilbanks verbally abused and ridiculed Jon in front of others. This public ridicule and abuse began taking its toll on Jon, and continually decreased his ability to perform well.

Because the above statements alleging Wilbanks' increased hostility towards Jon, public ridicule of Jon and resulting decrease in Jon's ability to perform well are not supported in the record and were not available to the district court or the court of appeals in this case, such statements should not provide any basis for a decision on the petition in this case.

Petitioners provide an incomplete account of the TEA investigation results on pages 4-5 of their petition. Contrary to the impression left by Petitioners' statement of facts, the TEA expressly refused to sustain any of Petitioners' four allegations. (Pet. App. 33). The TEA investigation also specifically revealed that the "rumor" Petitioners allude to on page 4 was unsubstantiated because there was no evidence that Wilbanks and Principal Curry forced the assistant band director McSpadden to write a letter and McSpadden felt no pressure to sign any document with which he strongly disagreed. (Pet. App. 31). Any references to findings made in the TEA investigation should be read in conjunction with the

agency's conclusions provided as an appendix to the petition. (Pet. App. 30-33).

Finally, Petitioners provide no record reference for the proposition that despite an order of reassignment, the administration allowed Wilbanks to teach a percussion class at Oakwood Middle School. (Petition at 5). Such information was not provided to the district court nor to the court of appeals in this case, nor is such information contained either in the TEA investigation or Petitioner Joyce Yvonne Shinn's affidavit. (Pet. App. 13-33). Likewise, Petitioners' conclusion that the Board ratified Wilbanks' actions and "systems" by reinstating him to the classroom is a legal conclusion unsupported by any facts in the TEA report, Joyce Yvonne Shinn's affidavit or the Petitioners' first amended complaint. (Petition at 5). Both references should be disregarded by this Court as unsupported by the record in this case.

REASONS FOR DENYING THE WRIT

The United States Court of Appeals for the Fifth Circuit properly affirmed entry of summary judgment in favor of Respondents and ordered that reasonable attorney's fees and double costs be awarded to Respondents for defending Petitioners' frivolous appeal of legal points not arguable on the merits. Petitioners stated no recognizable cause of action under federal law or the Texas Constitution because Petitioners failed to show a violation of a clearly established constitutional right. Furthermore, the individual Respondents are immune from suit under the Doctrine of Qualified Immunity based upon

their official capacities with a local school district of the State of Texas. The entire dispute between the parties rests upon Petitioners' perception that Wilbanks exhibited "unprofessional behavior" as band director which resulted in a "poor year for the band" and "the infliction of severe emotional distress upon many of the [unidentified] students, including Jon Shinn." (Pet. App. 8-9). Because Petitioners have cited no authority for their position that Jonathan Shinn's constitutional rights have been violated, the writ of certiorari should be denied.

I.

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS FAILED TO STATE A PROPER CLAIM UNDER 42 U.S.C. § 1983.

To establish their position that Texas law creates a constitutional claim under 42 U.S.C. § 1983, Petitioners rely only on a recent Texas state court decision, *Spacek v. Charles*, 928 S.W.2d 88, 93 (Tex. App. – Houston [14th Dist.] 1996, n.w.h.). In *Spacek*, a student sued his high school athletic coaches, asserting federal and state claims related to the coaches' behavior, including alleged threats, use of physical force and placing a gun against the student's head. The *Spacek* court first recognized that Section 1983 imposes liability for violations of rights protected by the United States Constitution, but not for violations of duties of care arising under state tort law. *Id.* at 92. The court then affirmed the lower court's denial of defendants' motion for summary judgment on two of the plaintiff's four constitutional claims because the defendants did not address those two claims in the district

court. *Id.* at 93-94. Procedurally, these two constitutional claims were not subject to summary judgment.

The *Spacek* decision does not stand for the proposition that there is a recognized liberty interest to be free from emotional harassment caused by intentional and/or reckless behavior. To the contrary, the *Spacek* court holds that mere words – however violent – do not constitute a simple assault and do not rise to the level of a constitutional violation of a liberty interest under Section 1983. *Id.* at 93. The *Spacek* court also held that whether an injury is more than *de minimis* so as to implicate a constitutional violation "is determined within the context of contemporary standards of decency, and not by the significance of the injury." *Id.* Only where there is a recognized constitutional violation is actual physical injury to the plaintiff not required. *Id.*[1]

Coach Spacek's motion for summary judgment on failure to state a claim under Section 1983 was denied not because the student established a violation of a recognized constitutional right, but rather because Spacek did not address the plaintiff's Fifth Amendment substantive due process and Fourteenth Amendment equal protection claims in his motion. *Id.* at 94. Coach Spacek thereby failed to meet his burden to prove immunity as to those claims. *Id.* Furthermore, the record in *Spacek* reflected a

---

[1] In the "injury" portion its opinion, the *Spacek* court relied exclusively on *Jefferson v. Ysleta Independent School District*, 817 F.2d 303, 304 (5th Cir. 1987), a case where a student was tied to a chair for two days in school. The *Ysleta* case was addressed and distinguished on its facts in both Respondents' brief on appeal and in oral argument before the court of appeals in this case.

fact issue regarding whether the coaches' actions went beyond mere words in disciplining the student with respect to the plaintiff's Fourth and Eighth Amendment claims. *Id.* at 93.

The *Spacek* opinion was decided after the district court granted Respondents' motion for summary judgment in this case, but before oral argument in the court of appeals. Petitioners chose not to cite or rely upon *Spacek* in the court of appeals. Nevertheless, the *Spacek* decision does not recognize a liberty interest to be free from emotional harassment caused by intentional and/or reckless behavior or severe emotional distress.

On March 28, 1995, in its lengthy *Order* granting defendants' Motion for Summary Judgment in the instant case; the district court concluded:

> Personality disputes and problems with teachers throwing away [band] equipment do not rise to the level of rights so fundamental as to call Constitutional jurisprudence into play. 42 U.S.C. § 1983 was enacted as part of the Ku Klux Klan Act in 1871 to provide a federal forum for the formerly enslaved, and has expanded to embrace the ideals of a nation, not to settle what is basically a local, school district-governed dispute.
>
> The Court declines Plaintiff's invitation to include the right to be free from mean teachers, if such vengeful behavior in fact existed, on the list of fundamental rights the United States Supreme Court has found to be protected by substantive due process. Matters such as ineffective teaching and personality conflicts are best

> addressed by local school boards and not by federal courts.

(App. 14a). The instant case does not involve a student threatened with death by hanging, as in *Spacek*, but rather is one of an off-beat band director and a student who wanted to play *many* band instruments – not just the b-flat clarinet as Wilbanks had, in his discretion, decided. (Pet. App. 13). The court of appeals correctly noted that Petitioners conceded at oral argument that this case is not one that implicates the Texas Constitution. (Pet. App. 12). Likewise, nothing in the *Spacek* decision changes the unavailability of claims for Petitioners under the United States Constitution. *Spacek* does not support Petitioners' claim that their constitutional rights have been violated. The court of appeals correctly held that Petitioners failed to state a claim under Section 1983.

I.A.

Petitioners Failed To State a Proper Claim Under 42 U.S.C. § 1983 Regarding Jonathan Shinn's Alleged Liberty Interest in Being "Free from Emotional Harassment."

In their petition for writ of certiorari, Petitioners cite several cases for the proposition that Jonathan Shinn had a constitutional liberty interest in being free from emotional harassment. Each of these cases involves severe physical abuse *much* graver than the "misbehavior" characterized by Petitioners in this case. It is illogical for Petitioners to suggest that Wilbanks' conduct is akin to the sexual molestation of a student that occurred in *Doe v. Taylor I.S.D.*, 15 F.3d 443 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 130 L.Ed.2d 25, 115 S.Ct. 70 (1994). Similarly, the

severe physical abuse at issue in *Jefferson v. Ysleta Independent School District*, 817 F.2d 303 (5th Cir. 1987), where a teacher lashed a second grade student to a chair for two days, without breaks, is also well beyond the scope of Petitioners' allegations. When viewed alongside *Lopez v. Houston I.S.D.*, 817 F.2d 1351 (5th Cir. 1987), where a school employee failed to intervene in the beating of a student on the school bus by a third person, Wilbanks' letting band students stay up late on an overnight trip pales by comparison. (Pet. App. 17). Each of these cases cited by Petitioners involves physical harm more severe than the alleged "lack of leadership and discipline" and to the Petitioners' "alleged extreme dissatisfaction with Wilbanks' performance as band director." (Pet. App. 7-8). After considering the case law cited by Petitioners, the district court held there is no constitutional "right to be free from mean teachers." (Appendix 14a). The court of appeals disapproved of grafting the rights recognized in *Doe, Ysleta* and *Lopez* onto the instant case by holding that there is "no constitutional right to be free from emotional distress." (Pet. App. 9). Petitioners' continued repetition of their claims in each successive appellate forum cannot alter their inability to support their claims under state or federal law.

I.B.

Petitioners Failed to State a Proper Claim Under 42 U.S.C. § 1983 Regarding Jonathan Shinn's Alleged Liberty Interest in Being Free from Punishment Absent Personal Guilt.

The right to be free from punishment absent personal guilt is actionable under 42 U.S.C. § 1983 only when that

punishment deprives the plaintiff of a constitutionally protected right. (Pet. App. 9). Petitioners made no such allegation in this case. Petitioners base their entire argument that Jonathan Shinn has a liberty interest in being free from punishment absent personal guilt on one case that was decided over 20 years ago in the United States Court of Appeals for the Fifth Circuit – *St. Ann v. Palisi*, 495 F.2d 423 (5th Cir. 1974).

The *St. Ann* case is distinguishable from the present case because it involved a written school board regulation providing that students could be suspended or punished by reason of their parents' conduct, which the court found to be unconstitutional. *Id.* at 428. In the instant case, the district court agreed with Respondents' distinction that Petitioners' allegations involve neither a written school board policy nor punishment in the form of suspension from school. (Appendix 10a-11a). The court of appeals likewise held that the right to be free from punishment absent personal guilt is only actionable when that punishment deprives the plaintiff of a constitutionally protected right. (Pet. App. 9). Because Petitioners in this case do not allege facts sufficient to prove that punishment has deprived them of a constitutionally protected right, Petitioners' claims fail.

I.C.

Petitioners Failed to State a Proper Claim Under 42 U.S.C. § 1983 Regarding Jonathan Shinn's Alleged Exercise of His Right to Protected Speech.

The court of appeals noted that Petitioners "have not alleged what speech Jonathan engaged in, nor have they

alleged facts indicating that Wilbanks' action amounted to retaliation or infringement on Jonathan's first amendment rights." (Pet. App. 10). Therefore, the court of appeals correctly held that Petitioners failed to state a proper claim under 42 U.S.C. § 1983 regarding Jonathan Shinn's alleged exercise of his right to protected speech. In assigning such error, Petitioners fail to allege, even at this late date, what speech Jonathan may have exercised that infringed on his First Amendment rights. Petitioners cite only one record reference – the affidavit of Yvonne Shinn – for the proposition that "Jonathan Shinn reported Wilbanks' behavior to his mother." (Pet. App. 13). Petitioners state that "it is a reasonable inference that Wilbanks deduced Jonathan Shinn to have been of [sic] reporter of his, Wilbanks', school behavior and thus a source of his problems" and then infer that Wilbanks punished Jonathan Shinn for making a report to his mother. (Petition at 13-14).

The tenuous causal relationship proposed by Petitioners does not illuminate what speech Jonathan Shinn may have uttered "to his mother" or whether any such speech deserves constitutional protection. Petitioners also fail to allege any facts indicating that Wilbank's actions amounted to retaliation or infringement on Jonathan's First Amendment rights. (Pet. App. 10), *citing Haverkamp v. Unified Sch. Dist. No. 380,* 689 F.Supp. 1055, 1058-59 (D.Kan. 1986) (dismissing plaintiff's First Amendment claim where the complaint did not indicate retaliation by school officials or a restriction of plaintiff's First Amendment rights); *see also Wilson v. UT Health Center,* 973 F.2d 1263, 1270 (5th Cir. 1992) (upholding directed verdict on

First Amendment claim because plaintiff produced insufficient evidence that certain defendants "retaliated against her for her speech"), *cert. denied*, 507 U.S. 1004 (1993). Finally, Petitioners fail to cite any authority for the proposition that a student's complaints to his mother and the possible consequences of such complaints deserve constitutional protection. Because Petitioners gave the court of appeals no evidence of any speech Jonathan Shinn may have uttered nor evidence that would indicate retaliation for any such speech, Petitioners' claims regarding free speech must fail.

I.D.

Petitioners Failed to State a Proper Claim Under 42 U.S.C. § 1983 Regarding Respondents Wilbanks, Chancellor, Curry and Dornburg' Entitlement to Qualified Immunity.

The court of appeals found that because Petitioners have failed to establish the violation of a clearly established constitutional right, the Respondents, in their individual capacities, are entitled to qualified immunity. (Pet. App. 12), *citing Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir.) (stating standard for qualified immunity), *cert. denied*, ___ U.S. ___, 116 S.Ct. 532 (1995). Petitioners do not point to claims in their petition that would establish the violation of a clearly established constitutional right. Instead, Petitioners merely cite the objective test for application of qualified immunity – whether "a constitutional right is clearly established if in light of pre-existing law the unlawfulness is apparent" – that is based on this Court's holding in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). As established in *Anderson v. Creighton*,

immunity may be waived if the constitutional right the official is alleged to have violated is "clearly established," in the sense that a reasonable official would understand that what he is doing violates that right, and in light of pre-existing law the unlawfulness must be apparent. *Id.* If both the district court and the court of appeals were unable to recognize the constitutional rights Petitioners claim were violated in this case, it follows that a reasonable official would not be able to understand that what he is doing violates the alleged rights, in light of the law existing at the time the complained-of events took place.

Even the *Spacek* trial court, which Petitioners argue created a constitutional right applicable to this case, *granted* the school district's motion for summary judgment on its immunity defense under facts involving death threats toward a student. Summary judgment was denied for the remaining defendant school coaches in *Spacek* because there was a question of fact concerning their use of excessive force (*i.e.*, holding the student in a headlock, threatening to kill him by pointing a gun to his head and reaching for an electrical cord to hang him). The denial of the coaches' motions for summary judgment based on their qualified immunity defense was affirmed in part (as to Fifth and Fourteenth Amendment claims) and reversed in part (as to those claims not properly raised in the trial court – the Fourth and Eighth Amendment claims).

The United States Court of Appeals for the Fifth Circuit in several recent decisions has upheld the immunity defense on claims similar to the present claims by Petitioners. In *Eugene v. Alief Independent School District*, the court of appeals affirmed the district court's dismissal

of plaintiffs' claims of federal and constitutional violations against the school district and school officials because there could be no state constitutional tort claims and plaintiffs did not show that the school district acted in accordance with any official policy. 65 F.3d 1299 (5th Cir. 1995), *cert. denied*, 134 L.Ed.2d 782, 116 S.Ct. 1680 (1986). Likewise, in *Lopez v. Houston Independent School District*, the court of appeals affirmed the district court's dismissal of plaintiffs' claims of federal and constitutional violations against the school district and its officials because there was no evidence of any official policy or widespread practice throughout the district which deprived constitutional rights and plaintiffs could not bring suit against the district's officials in their individual capacities. 817 F.2d 1351 (5th Cir. 1987). Both of the foregoing cases were brought by plaintiffs who were represented by Petitioners' counsel in this case.

Even if this Court were to find a violation of a constitutional right, Petitioners have never alleged and do not now allege that Respondents Wilbanks, Chancellor, Curry and Dornburg acted pursuant to an official custom or policy of the Respondent school district, or that the school district implemented such an official custom or policy. Based upon such failure to allege that Wilbanks, Chancellor, Curry and Dornburg acted pursuant to an official custom or policy of the school district, or that the school district implemented such an official custom, the court of appeals found that there could be no Section 1983 liability for the school district or for the Respondents in their individual capacities. (Pet. App. 12), *citing Meadowbriar Home For Children, Inc. v. Gunn*, 81 F.3d

521, 533 (5th Cir. 1996). Without more than blanket assertions that constitutional rights have been violated, there can be no liability for any of the individual Respondents in their official capacities.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS' APPEAL WAS FRIVOLOUS

In their petition, Petitioners recognize that a "frivolous appeal is one which involves legal points not arguable on the merits." *Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985), *cert. denied*, 493 U.S. 818 (1989). Frivolous appeals are disfavored because "[o]ur society in general, and appellate courts in particular, labor under a heavy burden of litigation which is 'needlessly aggravated when frivolous appeals are taken.' " *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984), *citing United States v. Santa Fe Engineers, Inc.*, 567 F.2d 860, 861 (9th Cir. 1978) (per curiam). The standard for the imposition of penalty for pursuing a "frivolous appeal" is whether the appeal is found groundless, without foundation and without merit, regardless of whether it was brought in bad faith. *Christiansburg Garment Co. v. EEOC*, 434 U.S.412, 421 (1978).

Petitioners assert that their appeal to the Fifth Circuit was based upon arguable and valid legal points, presumably that Petitioners have constitutionally protected interests under state and federal law that have been violated. However, Petitioners argued to the court of appeals that "an appeal which simply lacks merit is not always frivolous," effectively conceding that their appeal lacked

merit. Appellants' Response to Court's Order to Show Cause, or, alternatively, Petition for Rehearing at 4, *citing Crain v. C.I.R.*, 737 F.2d 1417, 1418 (5th Cir. 1984). In presenting Question No. 2 to the Court, Petitioners provide no support for their blanket statement that their appeal to the Fifth Circuit was based on arguable and valid legal points. The court of appeals recognized in footnote 1 of the October 3, 1996 opinion in this case that:

> [T]he attorney who brought this appeal did not appear at oral argument. Instead, he sent a colleague who conceded at oral argument that the Plaintiffs' claims under the Texas Constitution were without merit.

(Pet. App. 12). Petitioners now contend that they should not be burdened with the consequences of pursuing issues first on appeal and now on Petition for writ of certiorari which were "conceded" at oral argument as being without merit, regardless of whether they were brought "in good faith."[2]

In the court of appeals, Petitioners' counsel stated that his clients requested an appeal in this case, which he felt obligated to pursue, to his and his clients' ultimate detriment. Petitioners' counsel argued that he had a duty to appeal as follows:

> It is the client who determines whether an appeal shall be taken. 7A C.J.S. § 203, citing *Hawkeye-Security Ins. Co. v. Indemnity Ins. Co. of North America*, 260 F.2d 361, 363, 91 A.L.R.2d 618

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[2] A list of reported cases over the past 10 years in which Petitioners' counsel brought claims identical to the claims he has brought in this case. In each case, Petitioners' counsel's claims were rejected on appeal. *See* Appendix C.

> (10th Cir. 1958). See *Jones v. Banner Creamery*, 214 S.W.2d 487 (Tex. Civ. App. 1948); *Ex Parte Wood*, 87 S.W.2d 487 (Tex. Crim. App. 1935); *Ex Parte Maple*, 33 S.W.2d 734 (Tex. Crim. App. 1930). In this case, the client, Plaintiff-Appellants, requested an appeal. Accordingly, counsel for Plaintiff-Appellants submitted their appeal in good faith, and based on issues of substance. "An attorney authorized to take appellate proceedings cannot abandon or withdraw the same after they have been taken." 7A C.J.S. § 203. Counsel had no intent to offend this Court by complying with Plaintiff-Appellants' wishes, and submitting the appeal. Therefore, counsel for Plaintiff-Appellants respectfully request the Court to forego punishment, and find that this appeal was substantive such that it did not rise to the level of frivolous.

Appellants' Response to Court's Order to Show Cause, or, alternatively, Petition for Rehearing at 11. Despite the foregoing argument, Petitioners' counsel has no right, let alone a duty, to bring a frivolous appeal in Texas. TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 3.01, 3.02 (1989), *reprinted in* TEX. GOV'T CODE ANN., tit 2 subtit. G app. (Vernon Supp. 1996) (State Bar Rules art X, § 9). One guideline for Texas attorneys' conduct is The Texas Lawyers' Creed which provides "I will advise my client that we will not pursue any course of action without merit." The Supreme Court of the State of Texas, *The Texas Lawyer's Creed – A Mandate for Professionalism* (November 7, 1989). After a judgment has been entered, an attorney has the duty and obligation to (1) advise a client of the *right* to file an appeal of an adverse judgment and (2) to inform the client whether the attorney will pursue the appeal.

An experienced civil rights attorney must be accountable for maintaining a "plainly baseless suit" and "charging forth with the litigation in disregard of its manifest lack of merit." *Blue v. United States Dept. of the Army*, 914 F.2d 525, 546-48, 550 (4th Cir. 1990), *cert. denied*, 499 U.S. 959, 111 S.Ct. 1580 (1991) (upholding sanctions award of reasonable attorneys' fees and double costs against an experienced and distinguished litigator). Petitioners' counsel over the past ten years has brought at least ten reported cases before the Court of Appeals for the Fifth Circuit on similar, if not identical, claims. (See App. C). In each case, the claims and Appellants' counsel's arguments on appeal synonymous to those presented in this case were rejected by the court of appeals. To date, this Court has not granted *certiorari* in any such case and denied *certiorari* in two of the cases.

The standard for determining whether an appeal is frivolous is whether "the court of appeals determines that an appeal is frivolous." FED R. APP. P. 38. In this case, the court of appeals made the determination that Petitioners' appeal was frivolous and that counsel failed to show cause why sanctions should not issue. Under the applicable "abuse of discretion" standard, this Court should deny Petitioners' request for certiorari on this issue and allow the decision of the court of appeals to stand.

CONCLUSION

Respondents respectfully request that the writ of certiorari be denied.

Respectfully submitted,

Counsel of Record for Respondents
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APPENDIX A

SHINN v. COLLEGE STATION INDEPENDENT SCHOOL DIST.

Yvonne SHINN, on behalf of Jonathan Daniel SHINN; John Eugene Shinn, on behalf of Jonathan Daniel Shinn, Plaintiff-Appellants.

v.

COLLEGE STATION INDEPENDENT SCHOOL DISTRICT; Kenneth Wilbanks; Ray Chancellor; Bob Curry; William Dornburg, Defendants-Appellees.

No. 95-20328.

United States Court of Appeals,
Fifth Circuit.

Nov. 22, 1996.

Appeal from the United States District Court for the Southern District of Texas, John D. Rainey, Judge.

ON PETITION FOR REHEARING

(Opinion Oct. 3, 1996, 5th Cir., 1996, 96 F.3d 783.)

Before GARWOOD, EMILIO M. GARZA and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion for leave to file request for rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is DENIED. The court has reviewed the authority cited in the petition and finds that none raises disagreements with a high school band director to the level of a violation of the First or Fourteenth Amendments.

IT IS FURTHER ORDERED that, counsel having failed to show cause why sanctions should not issue, double costs and reasonable attorney's fees are hereby awarded to Defendants pursuant to FED.R.APP.P. 38. Defendants should submit to this court their attorney's fees statement and costs within two weeks of entry of this order.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

JOYCE YVONNE SHINN and JOHN EUGENE SHINN, on behalf of JONATHAN DANIEL SHINN,	§	CIVIL ACTION NO. H-93-3055
Plaintiff	§	
VS.	§	
COLLEGE STATION I.S.D., et al,	§	(Filed Mar. 30, 1995)
Defendants.	§	

ORDER

Pending before this Court is a Motion for Summary Judgment (Docket Entry #22) filed by Defendants College Station Independent School District, Kenneth Wilbanks, Ray Chancellor, Bob Curry and William Dornburg, all in their independent and official capacities (collectively, "Defendants"). After consideration of the pleadings, the responses, and the applicable law, it is the Court's opinion that this motion be GRANTED.

I. Statement of the Case

Plaintiff Jonathan Daniel Shinn ("Plaintiff") was a freshman member of the A & M Consolidated High School Band. Plaintiff, through his parents and their lawyer, filed a complaint in this Court alleging that his Constitutional rights were violated by Defendant Kenneth Wilbanks' behavior as A & M Consolidated's Band

Director. Plaintiff alleges eight full pages of wrongs perpetrated by Wilbanks, ranging from his alleged "insistence" that Plaintiff play only the B-flat clarinet to his alleged "showing [of] disrespect" to the assistant band director to failing to hand out band rules until six entire weeks after the start of practice and failing to provide parents with "information" about the marching band competition in Killeen, Texas – which resulted in Plaintiff's parents arriving at the competition four hours and fifteen minutes early. Plaintiff claims that Wilbanks did not handle the school's band instruments properly, and that Plaintiff was "yelled at" when he tried to turn in his instrument. Plaintiff further alleges that other students – who notably do not join this complaint – were mistreated by Wilbanks, and that Wilbanks on at least one occasion yelled at Plaintiff more than the other students. All in all, Plaintiff complains, the band had "a bad year." Plaintiff then, on the basis of these alleged incidents, proceeded to file a federal lawsuit claiming causes of action under the First and Fourteenth Amendments to the United States Constitution (brought pursuant to 42 U.S.C. §1983) and under the Texas Constitution. Plaintiff has also requested attorney's fees pursuant to 42 U.S.C. §1988. Defendants have moved for summary judgment on all causes of action.

II. Summary Judgment Standard

Rule 56(c) provides that "[summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. *See id.*, 477 U.S. at 323-28, 106 S.Ct. at 2553-54; *International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. *Celotex Corp. v. Catrett*, 477 U.S. at 323, 106 S.Ct. at 2553.

If the movant satisfies this *prima facie* burden, the burden shifts to the nonmovant, who must "set forth facts showing that there is a genuine issue for trial." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Willis v. Roche Biomedical Labs, Inc.*, 21 F.3d 1368, 1371 (5th Cir. 1994). The nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 586-87, 106 S.Ct. at 1356. When the facts presented by the nonmovant could not "lead a rational trier of fact to find for the nonmoving party," there "is no genuine issue for trial." *Id.*

When considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 254, 106 S.Ct. at 2513. The standard for summary judgment "mirrors the standard for a [motion for judgment as a matter of law][1] under Federal Rule of Civil Procedure 50(a)." *Id.*, 477 U.S. at 250, 106 S.Ct. at 2511. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.*, 477 U.S. at 255, 106 S.Ct. at 2513. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 257, 106 S.Ct. at 1356. Summary judgment is appropriate if "under the governing law, there can be but one reasonable conclusion as to

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[1] FED. R. CIV. P. 50(a) and (b) were amended, effective Dec. 1, 1991, to create a single motion for "judgment as a matter of law," available to the parties conducting a jury trial, which if denied, the moving party may renew after trial. Prior to the amendment, a Rule 50(a) preverdict motion was termed a motion for "directed verdict," while a postverdict motion was termed a motion for "judgment notwithstanding the verdict." The change in the rule has not altered the substantive standard that governs whether a party to a jury trial is entitled to judgment as a matter of law – the nonmovant must "ha[ve] been fully heard on an issue," and there must be "no legally sufficient evidentiary basis for a reasonable jury to find for [the nonmovant] on that issue." FED. R. CIV. P. 50(a) & advisory committee's 1991 note ("The term 'judgment as a matter of law' is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules . . . . It effects no change in the governing standard.").

the verdict;" if "reasonable minds can differ as to the import of the evidence," however, summary judgment should not be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250-51, 106 S.Ct. at 2511. *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 855 (5th Cir. 1993).

III. Analysis

A. Claims Under the Texas Constitution

As previously noted, Defendants have moved for summary judgment on all counts. Plaintiff has alleged that Defendants have violated his rights under both the United States Constitution and the Constitution of Texas. The Court first notes the Texas Supreme Court recently held that Texas law does not recognize a "constitutional tort" analogous to 42 U.S.C. §1983 or a Bivens-type action entitling the pursuit of a private cause of action for damages. *City of Beaumont v. Bouillion*, ___ S.W.2d ___, 1995 WL 64173, *5 (February 15, 1995). The Fifth Circuit and other Texas courts have taken the same position. *See, Gillum v. City of Kerrville*, 5 F.3d 117, 122 (5th Cir. 1994) (cert. denied, ___ U.S. ___, 114 S.Ct. 881 (1994); *Bagg v. Univ. of Tex. Medical Branch*, 726 S.W.2d 582, 584 n.1 (Tex.App. – Houston [14th Dist.] 1987, writ ref'd n.r.e.) (citations omitted); *Albertson's, Inc. v. Ortiz*, 856 S.W.2d 836, 839 (Tex.App.– Austin 1993, writ denied); *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857, 872-3 (Tex.App. – Amarillo 1993, writ denied); *Tutt v. City of Abilene*, 877 S.W.2d 86, 88 (Tex. App. – Eastland 1994, writ requested). This Court declines Plaintiff's invitation to break new ground in Texas case law. Summary judgment should be

granted on Plaintiff's claims under the Texas Constitution.

B. Claims Under The United States Constitution

Plaintiff has stated his causes of action under two headings: (1) "Liberty interest" and (2) "Freedom of Speech." Under Liberty Interest, Plaintiff claims (a) a "consistently (sic) protected liberty interest to be free from emotional harassment caused by the intentional an(sic)/or reckless behavior of Defendant Wilbanks;" (b) "the right to be free from punishment absent personal guilt for exercising his freedom of speech" and (c) "the reckless behavior of all the defendants violated [his] constitutional rights by failing to protect him against emotional distress and harassment." Under Freedom of Speech, Plaintiff claims (a) "a constitutionally protected right to be free from retaliation motivated by the exercise of his freedom of speech" and that (b) "[he] was directly retaliated against . . . for his parents, involvement with the TEA investigation and resulting newspaper article."[2]

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[2] The Court notes that although the complaint states that his *parents* were the people who spoke out about the band director, Plaintiff appears to be asserting that he has a Constitutionally-protected right to be free from retaliation from exercising *his* right to free speech. As the Court is bound to draw all inferences in favor of the nonmovant, the Court will examine this claim as stated.

1. "Liberty Interest" Claims

42 U.S.C. §1983 allows private parties to bring suit in the federal courts to recover damages for violations of constitutional rights. As §1983 does not list those rights which are actionable, the extent of the rights protected has largely been left to the federal courts to define. In addition to the rights explicitly stated in the Constitution, the Fifth and Fourteenth Amendments have been interpreted to have substantive content and protect rights "that have little or no textual support in the constitutional language." *Bowers v. Hardwick*, 478 U.S. 183, 191 (1986). The United States Supreme Court has stated that the rights which qualify for "heightened judicial protection" are those "fundamental liberties that are 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed' " *Id.* at 191-92, quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). Stated differently, these "substantive due process" liberties have been characterized as those freedoms that are "deeply rooted in this Nation's history and tradition." *Id.* at 192, quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

In *Bowers*, the Supreme Court counseled the lower courts to proceed with caution in expanding upon these fundamental liberties:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause . . . There should be great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise,

> the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Bowers at 194-95.

Plaintiff asks this Court to find "the right to be free from emotional harassment caused by the intentional an(sic)/or reckless behavior of Defendant Wilbanks" and "the right to be free from punishment absent personal guilt for exercising his freedom of speech" to be among these fundamental rights. Plaintiff cites *Jane Doe v. Taylor ISD*, 15 F.3d 443 (5th Cir. 1994), *Gonzalez v. Ysleta ISD*, 996 F.2d 745 (5th Cir. 1993), and *St. Ann v. Palisi*, 495 F.2d 423 (5th Cir. 1974) as support for his position that a constitutional case exists on these facts. However, the Court is in agreement with Defendants that the above-cited cases are clearly distinguishable. *Doe* and *Gonzalez* found that students have a constitutionally-protected liberty interest in being free from unwanted sexual advances by teachers. Plaintiff would have the court compare the case, under the best possible reading of the facts, of a band director being mean to him with sexual abuse. This we decline to do.

St. Ann involved school children who were suspended then transferred pursuant to a school district regulation after their mother struck an assistant principal. The author of this twenty-year-old 2-1 decision relied on criminal cases in reaching the decision that the children had the fundamental right to be free from punishment absent personal guilt. *St. Ann* has since been interpreted

as standing for the proposition that students have a property right in attending public school; the punishment (depriving them of attending school) thus amounted to a deprivation of a constitutionally-protected right. *Burris v. Willis ISD*, 713 F.2d 1087, 1093, n. 3 (5th Cir. 1983). The facts in this case, which are not in dispute, show that Plaintiff was not deprived of his right to attend school; moreover, the Court fails to see how being yelled at and scowled at more than the other students and being transferred pursuant to an official policy can be compared as "punishment."

Plaintiff's claim under "Liberty Interest" of "failure to protect" applies to the individual defendants and is discussed in Paragraph C below.

2. "Freedom of Speech"

After examining the responses to the motions for summary judgment it appears to the Court that this cause of action has fallen by the wayside. However, it was raised in the complaint and therefore will be addressed. This case has been styled from its inception "Joyce Yvonne Shinn & John Eugene Shinn *on behalf of* Jonathan Daniel Shinn." This has led the Court to believe that one plaintiff exists in this case, Jonathan Daniel Shinn. Subsequent filings in this case seem to indicate that his parents are also plaintiffs in their own right. However, the procedural confusion does not change the Court's opinion that the facts, viewed in the light most favorable to whomever the plaintiffs are, do not state a constitutional violation.

According to the complaint, Plaintiff's parents spoke to a local newspaper about the band director. The band director allegedly lectured the students about the newspaper story at a band meeting and "directed his comments at Jon Shinn." The cause of action "Freedom of Speech" says at (a) that "Plaintiff has a . . . right to be free from retaliation motivated by the exercise of his freedom of speech" then at (b) that "Plaintiff was directly retaliated against . . . for his parents' involvement." The court is unsure if "Plaintiff" is saying that he spoke and was punished for it (a fair reading of (a)) or that he was punished for his parents' speech (a fair reading of (b)). Suffice it to say that no facts were pled indicating that Jonathan Daniel Shinn spoke and was punished for his speech nor that his parents spoke and were punished for their speech, so no cause of action may be maintained under such a theory.

The Court believes that (b) must be a more accurate statement of Plaintiff's complaint: that the child has a constitutionally-protected right in not being retaliated against for his parents' speaking to the press about the band director. This cause of action looks strikingly like Plaintiff's earlier argument that he has a fundamental right to be free from punishment absent personal guilt. This cause of action fails again for the same reasons stated above.

C. Individual Defendants

Plaintiff has also sued Defendants Kenneth Wilbanks, Ray Chancellor, Bob Curry and William Dornburg in both their official and individual capacities, the latter three

apparently for "failing to protect" Plaintiff from the former's alleged "emotional harassment." The Court finds that suit against these defendants in their official capacities is tantamount to Plaintiff's suit against CSISD, which the Court has found meritless.

As to Plaintiff's suit against these defendants individually, qualified immunity shields state officials from individual liability under 42 U.S.C. §1983 unless the official's conduct violates "clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1981). The examination of a claim of qualified immunity involves a two-step process. The first inquiry is whether the plaintiff has alleged a violation of a constitutional right. *Siegert v. Gilley,* 500 U.S. 226, 232 (1991). The next step is to determine whether that right was clearly established at the time the events took place. *Id.* A review of the record reveals that Plaintiff has failed to allege any facts implicating these defendants individually in any violation of a clearly established constitutional right. The Court reiterates that the facts, of which there is no genuine issue, show that Plaintiff was not deprived of any substantive due process rights.

D. Attorney's Fees

Since the Court has found that Plaintiff's civil rights claims fail in their entirety, Plaintiff's claim for attorney's fees must also fail, as he is not a prevailing party. *See, Farrar v. Hobby,* ___ U.S. ___, 113 S.Ct. 566 (1992); *Pembroke v. Wood County,* 981 F.2d 225, 230 (5th Cir. 1993) *cert. denied,* 113 S.Ct. 2965 (1993).

IV. Conclusion

Personality disputes and problems with teachers throwing away equipment do not rise to the level of rights so fundamental as to call Constitutional jurisprudence into play. 42 U.S.C. §1983 was originally enacted as part of the Ku Klux Klan Act in 1871 to provide a federal forum for the formerly enslaved, and has expanded to embrace the ideals of a nation, not to settle what is basically a local, school district-governed dispute. *See, Monroe v. Pape,* 365 U.S. 167, 174-175 (1961). As the Sixth Circuit has stated, "[S]ubstantive due process is not concerned with the garden variety issues . . . [it] affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . " *Charles v. Baesler,* 910 F.2d 1349 (6th Cir. 1990) (internal quotations omitted).

The Court declines Plaintiff's invitation to include the right to be free from mean teachers, if such vengeful behavior in fact existed, on the list of fundamental rights the United States Supreme Court has found to be protected by substantive due process. Matters such as ineffective teaching and personality conflicts are best addressed by local school boards and not by federal courts.

The Court finds that there is no genuine issue of material fact as to whether Plaintiff's constitutional rights were violated, and that Defendants are entitled to judgment on each of these claims as a matter of law.

For the foregoing reasons, it is ORDERED that Defendant's Motion for Summary Judgment be GRANTED.

The Clerk shall enter this Order and provide a true copy to all parties.

Signed this 28th day of March, 1995.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES
DISTRICT JUDGE

APPENDIX C

The following is a list of reported cases over the past 10 years in which Petitioners' counsel brought identical claims to those he brought in this case. In each case, Petitioners' counsel's claims were rejected by the court of appeals.

Fowler v. Smith and Angelton Independent School District, 68 F.3d 124 (5th Cir. 1995):

> Plaintiff's claims for violations of First Amendment freedoms and substantive and procedural due process against school district, superintendent and other school officials. The district court's summary judgment for defendants was affirmed by the court of appeals.

Eugene v. Alief Independent School District,
65 F.3d 1299 (5th Cir. 1995),
cert denied, 134 L.Ed. 782, 116 S.Ct. 1680 (1996):

> The court of appeals affirmed the district court's dismissal of plaintiffs' claims of federal and constitutional violations against the school district and school officials because there can be no state constitutional tort claims and plaintiffs did not show that the school district acted in accordance with any official policy.

Continental Casualty Company v. McAllen Independent School District,
850 F.2d 1044 (5th Cir. 1988) (*per curiam*):

> The court of appeals rejects student's claim that the injuries to his body (burns suffered at school) were "constitutional" and therefore, not excluded under the school district's liability policy exclusion for bodily injury. The district

court's judgment that school district's liability policy does not cover the student's damages is affirmed.

Noyola v. Texas Department of Human Resources, 846 F.2d 1021 (5th Cir. 1988):

District court denied individual defendant's motion for summary judgment based upon the defense of qualified immunity from plaintiff's claims for violation of First Amendment freedoms. Stating that plaintiff's "case remains once of nuance" and that "no Fifth Circuit case as of 1981 has found a first amendment violation on facts like these," the court of appeals reversed and remanded for judgment in favor of the defendants.

Lopez v. Houston Independent School District, 817 F.2d 1351 (5th Cir. 1987):

The court of appeals affirmed the district court's dismissal of plaintiffs' claims of federal and constitutional violations against the school district and its officials because there was no evidence of any official policy or widespread practice throughout the district which deprived constitutional rights and plaintiffs could not bring suit against the district's officials in their individual capacities.

Montgomery v. Trinity Independent School District, 809 F.2d 1058 (5th Cir. 1987):

Plaintiff claimed her probationary contract was not renewed in retaliation for her disagreement with policies, involvement in a Texas teachers' association and for her husband's "outspokenness" regarding tax measures. The district court granted a directed verdict for the school district

and its officials. The court of appeals affirmed because the teacher failed to present any facts in support of her allegations.

McAdams v. Matagorda County Appraisal District,
798 F.2d 842 (5th Cir. 1986):

Plaintiff sued the district and its board members for terminating him for the exercise speech protected by the First Amendment. The district court granted summary judgment for defendants on plaintiff's due process claim and entered judgment not withstanding the verdict on the free speech claim. The court of appeals affirmed noting that plaintiff made only private statements to the board.

Thomas v. Harris County,
784 F.2d 648 (5th Cir. 1986) (per curiam),
cert denied, 122 L.Ed. 669 113 S.Ct. 1275 (1993):

Plaintiff claimed he was transferred for criticizing the police department and brought suit for violation of his constitutional rights and conspiracy against the county, the city, the police department, the district attorney, the mayor, the chief of police, the former chief of police, various city officials and a subdivision association. The district court granted summary judgment for the defendants. Summary judgment affirmed by the court of appeals for those defendants against whom no claims were made and who were immune from liability.

Kline v. North Texas State University,
782 F.2d 1229 (5th Cir. 1986):

Plaintiff college professor brought suit for constructive discharge in violation of his First Amendment rights against university and its

officials for "failing to act." The court of appeals reversed and rendered the jury's verdict for the plaintiff based on the expiration of the statute of limitations and plaintiff's failure to show how the defendants created any "intolerable situation" or failed to exercise any applicable duty.

Langoria v City of Bay City, Texas,
779 F.2d 1136 (5th Cir. 1986):

Homeowners brought suit against city and various city officials for conspiracy to deprive them of constitutional property rights through fraudulent representations. The district court granted summary judgment based on limitations. The court of appeals affirmed and did not reach the constitutional issues.